STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2011
v	No. 295562 Wayne Circuit Court
JOSHUA ASHDEN DYE, Defendant-Appellant.	LC No. 09-012540-01-FH

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant Joshua Ashden Dye was convicted of first-degree child abuse, MCL 750.316b(2), following a jury trial. The trial court sentenced defendant to serve 120 to 180 months in prison. Defendant appeals as of right. We affirm.

I

On April 27, 2009, two-year old Kaylee Stillwagon suffered a severe traumatic head injury while in defendant's care. At the time, defendant was the live-in boyfriend of Kaylee's mother, Christie Stillwagon. Defendant was caring for Kaylee while Christie was at work, as he had done before without incident. Defendant does not dispute that he caused Kaylee's injury. He told police that Kaylee was injured when, upon finding her unconscious on the floor, defendant picked her up, shook her in an attempt to awaken her, and unintentionally struck her head on a nearby table. Defendant eventually explained that after he and Kaylee watched two episodes of a children's television show, he put Kaylee in time out for refusing to eat her breakfast. Time out for Kaylee consisted of standing while facing a wall. Kaylee would not stay facing the wall, so defendant placed his hand on her back, between her shoulder blades, and held her there for 30 seconds to one minute. Kaylee had a blanket in her hand and was sucking her thumb. Defendant indicated that it was possible that, with her blanket near her mouth and her thumb in her mouth, Kaylee might not have been able to breathe while he was holding her against the wall. Defendant told police that after he held Kaylee against the wall, he went outside to smoke. Defendant was outside for approximately 15 minutes. When he returned, he found Kaylee unconscious on the floor near where she had been standing for her time out. Defendant told detectives that he picked Kaylee up and shook her "pretty hard," and that as he picked her up he hit the right rear portion of her head on a coffee table. When Kaylee did not awaken, he told police that he ran across the street to get help.

Cara Manuel lived across the street from defendant. She, and her friend Martin Woodruff, testified that defendant came to Cara's house with Kaylee and asked that Cara call 911. Woodruff observed defendant carrying Kaylee. Kaylee was limp and Woodruff thought she looked dead. Defendant looked down the street toward the fire department from his front porch before walking back toward the front door. He then appeared to notice that Cara's front door was open and walked across the street to Cara's house. He did not seem to be in any hurry. Defendant told Cara that Kaylee had "just passed out." He did not mention shaking her or hitting her head on the table. Cara called 911. The operator asked if Kaylee had a fever. When Cara relayed the question to defendant, he indicated that she did previously, but did not at the time. Defendant also indicated that Kaylee "started shaking." When paramedics arrived, defendant again indicated that she had been "shaking" earlier. They believed that Kaylee had suffered from a febrile seizure and treated her accordingly. However, Kaylee began vomiting while in the ambulance, which was not common in cases of febrile seizures.

Upon arrival at the local hospital, a CAT scan revealed bleeding and swelling of Kaylee's brain. Kaylee was placed on life-support and, because of the severity of her injury, she was flown to the University of Michigan Hospital (UM). The swelling of Kaylee's brain continued to worsen. Upon arrival at UM, Kaylee was taken emergently to surgery. Surgeons removed a portion of Kaylee's skull to relieve the pressure in her brain. Immediately as they did so, Kaylee's brain swelled beyond her skull two and one-half to five centimeters. This prevented surgeons from reapproximating Kaylee's skin over the exposed portion of her brain. Surgeons also determined that Kaylee suffered subdural bleeding in the right posterior area of the brain, as well as bleeding between the right and left hemispheres of her brain. The next day, it was determined that Kaylee also suffered multiple layers of retinal hemorrhaging. Kaylee's brain was severely injured and surgeons were concerned that her injuries would prove fatal.

Dr. Lisa Markman, a pediatrician and the Associate Medical Director of the Child Protection Team at UM testified that in her expert opinion, Kaylee's injuries were not consistent with any sort of behavior that a parent would normally engage in with a two-year old child, or with any sort of ordinary household fall, which would be analogous to the scenario described by defendant where a child is picked up and strikes the back of her head on a table. Rather, the injuries were consistent with a "violent act of trauma." Dr. Markman observed that even a severe household fall was not likely to result in retinal hemorrhaging. She further opined based on the amount of swelling and the degree of injury to Kaylee's brain, that there had been a lapse of time between the occurrence of the injury and Kaylee's presentation for medical care.

The jury was presented with alternative counts of first-degree child abuse and second-degree child abuse and they returned guilty verdicts as to both charges. Defendant's conviction for second-degree child abuse was dismissed at sentencing. As previously noted, defendant was sentenced on a single-count of first degree child abuse, to a prison term of 120 to 180 months.

II

Defendant first argues that the prosecution failed to present sufficient evidence at trial to permit a rational jury to conclude that he knowingly or intentionally caused serious physical harm to Kaylee. We disagree.

"Criminal defendants do not need to take special steps to preserve a challenge to the sufficiency of evidence." *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999); see also *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987). This Court reviews defendant's sufficiency claim de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), viewing all the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt, *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). All conflicts in the evidence must be resolved in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). When assessing a challenge to the sufficiency of the evidence, the trier of fact, not the appellate court, determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Id*.; *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

"A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child."[1] MCL 750.136b(2). *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004). "First-degree child abuse requires the prosecution to establish . . . not only that defendant intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by [his] act." *Id*. at 291. A defendant's intent may be inferred from all the facts and circumstances. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008); see also, *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005); *People v McRunels*, 237 Mich App 168, 181-182; 603 NW2d 95 (1999); *Fetterley*, 229 Mich App at 518.

Viewed in a light most favorable to the prosecution, there was sufficient evidence presented at trial to permit a rational trier of fact to find that defendant possessed the required intent for first-degree child abuse. Defendant did not contest that his actions caused Kaylee's injury. Dr. Markman testified that Kaylee's severe brain injury was caused by a "violent

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[1] Serious physical harm is defined as "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." MCL 750.136b(1)(f). That Kaylee suffered serious physical harm as a result of defendant's conduct is not at issue.

traumatic act" and was inconsistent with an accidental fall, with the sort of behavior that a parent would normally engage in with a two-year old child, or with defendant having unintentionally hit Kaylee's head on a table as he described; the degree of force needed to cause such severe injury to the brain exceeds that associated with even severe household falls. Additionally, the jury could infer consciousness of guilt from Dr. Markman's testimony that defendant did not seek immediate medical care after Kaylee was injured, from defendant's demeanor when seeking help for Kaylee, and from defendant's failure to disclose that he hit Kaylee's head on the table to medical personnel, so as to aid them in providing appropriate treatment to Kaylee. Again, because of the obvious difficulty of proving a defendant's intent, a jury is permitted to draw inferences from minimal circumstantial evidence, *Kanaan*, 278 Mich App at 622; *McGhee*, 268 Mich App at 623; *McRunels*, 237 Mich App at 181-182; *Fetterley*, 229 Mich App at 518, including the nature and extent of the victim's injuries and the degree of force needed to cause those injuries. This was sufficient to permit the jury to conclude that defendant intended to injure Kaylee and that he either intended to cause, or he knew that his conduct would cause, serious physical harm to her. Therefore, we conclude that the prosecution presented sufficient evidence at trial to support defendant's conviction for first-degree child abuse.

III

Defendant next argues that his conviction was against the great weight of the evidence. We disagree.

Even if evidence is legally sufficient to support a conviction, a new trial may be granted where the verdict is against the great weight of the evidence. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). This Court reviews a lower court's ruling on a motion for new trial based on the claim that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

There was testimony presented at trial that defendant had a good relationship with Kaylee and that he had not engaged in any abusive behavior toward her before the incident in question. However, defendant admitted that he caused Kaylee's injuries by shaking her and striking her head against a table. And, Dr. Markman testified that Kaylee's injuries could not have been caused by an ordinary fall or by defendant unintentionally striking Kaylee's head on a table as he described, but rather were caused by a "violent traumatic act." Thus, it cannot be said that the evidence "preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219.

IV

Defendant also argues that the prosecutor committed misconduct depriving him of a fair trial by arguing facts not in evidence and by mischaracterizing testimony during closing argument. We disagree.

A defendant preserves the issue of prosecutorial misconduct by making a timely, contemporaneous objection and request for a curative instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant failed to object to the prosecutor's remarks below and, therefore, this issue is unpreserved. *Id.* To avoid forfeiture of review of an unpreserved allegation of prosecutorial misconduct, the defendant must demonstrate a plain error that affected his substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). That is, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Issues of prosecutorial misconduct are decided on a case by case basis by reviewing the pertinent portion of the record in context. *Noble*, 238 Mich App 660. The test is whether the defendant was denied a fair trial. *Id.* The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995); *Brown*, 279 Mich App at 135. Prosecutors are afforded great latitude during argument; they may argue the evidence and all reasonable inferences that arise from the evidence in relationship to the theory of the case and need not state the inferences in the blandest possible terms. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007); *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001).

Defendant first objects to the prosecutor's characterization of Dr. Markman's testimony during closing argument. Defendant is correct that Dr. Markman testified generally that the term "abusive head trauma" encompasses "any number of ways that the head could be injured including blunt force trauma, shaking, [and] shaking with blunt force trauma impact." However, contrary to defendant's assertion, Dr. Markman also testified that Kaylee's injuries were not consistent with the scenario described by defendant where a child is picked up from the floor and strikes her head on a coffee table, but instead were caused by a "violent act of trauma." Likewise, and again contrary to defendant's assertion otherwise, Dr. Markman also testified that there was a lapse of time between the infliction of Kaylee's injury and her presentation for medical care. Thus, the prosecutor's comments on Dr. Markman's testimony were a fair comment on the evidence presented in relation to the prosecution's theory of the case, and did not constitute misconduct. *Bahoda*, 448 Mich at 282 *Dobek*, 274 Mich App at 66; *Knapp*, 244 Mich App at 381-382 n 6.

Next defendant asserts that the prosecutor impermissibly speculated and made assumptions regarding phone conversations between Christie Stillwagon and defendant. Again, however, these comments, addressing inferences that could be drawn from the evidence presented at trial regarding conversations between defendant and Christie and the information that Christie provide to police, were not impermissible. *Bahoda*, 448 Mich at 282 *Dobek*, 274 Mich App at 66; *Knapp*, 244 Mich App at 381-382 n 6.

Additionally, defendant objects to the prosecutor's argument that defendant's demeanor and lack of urgency in seeking help for Kaylee was indicative that defendant had committed a knowing and intentional act. Again, however, this argument was drawn from the evidence

presented at trial and reasonable inferences arising from that evidence in relationship to the prosecution's theory of the case. Woodruff testified that defendant was walking slowly when seeking help for the obviously seriously-injured Kaylee, and Dr. Markman testified that there was some lapse in time between the infliction of the injury and Kaylee's presentation for medical care. Therefore, the argument was permissible. *Bahoda*, 448 Mich at 282; *Dobek*, 274 Mich App at 66; *Knapp*, 244 Mich App at 381-382 n 6.

Further, we observe that, even were we to agree with defendant that any of these statements by the prosecutor were impermissible, the trial court instructed the jurors that the statements and arguments of the attorneys were not evidence. As this Court explained in *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008), "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions" (citations omitted). Thus, reversal of defendant's conviction is not warranted.

V

Finally, defendant challenges the scoring of offense variables (OV) 4 (psychological injury), 7 (excessive brutality) and 10 (vulnerable victim). Defendant concedes that he is entitled to resentencing only if he prevails on his challenge to the scoring of OV 7. He asserts that OV 7 is properly scored at zero points. We disagree.

Defendant timely objected to the scoring of the sentencing guidelines below. Therefore, this issue is properly preserved for this Court's review. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). This Court reviews a trial court's scoring decision for an abuse of discretion and to determine whether the record evidence adequately supports the score given. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Sentencing guidelines scoring decisions for which there is any supporting evidence will be upheld on appeal." *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995); see also, *Hornsby*, 251 Mich App at 468. To the extent that a scoring issue calls for statutory interpretation, review is de novo. *McLaughlin*, 258 Mich App 671.

OV 7 addresses aggravated physical abuse, and it provides for a score of 50 points where "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). There are only two possible scores for OV 7, zero points or 50 points. *People v Cline*, 276 Mich App 634, 653; 751 NW2d 563 (2007). OV 7 was scored at 50 points in this case based on a finding that defendant's actions were excessively brutal, as evidenced by the degree and nature of Kaylee's injuries. The phrase "excessive brutality" is not statutorily defined. "[W]hen terms are not expressly defined by a statute, a court may consult dictionary definitions." *People v Denio*, 454 Mich 691, 699, 564 NW2d 13 (1997). The primary definition of "brutality" found in *Webster's Random House College Dictionary* (1992) is, "[t]he quality of being brutal; cruelty; savagery." "Brutal" means "savage, cruel, inhuman . . . harsh, severe." *Id.* "Excessive" means "[e]xceeding a normal, usual, reasonable, or proper limit." *Id.* Thus, "excessive brutality" in the context of first-degree child abuse may be understood to be a level of cruelty or severity that exceeds the norm for this offense.

Dr. Markman testified at trial that Kaylee was injured by a "violent act of trauma" sufficient to cause brain swelling, subdural and interhemispheric bleeding in Kaylee's brain, and retinal bleeding. As stated previously, the swelling of Kaylee's brain was so significant that when surgeons removed a portion of her skull to relieve the pressure caused by the swelling, her brain immediately swelled outside of her skull a distance of between two and one-half to five centimeters - so much so that the surgeon could not cover the exposed portion of her brain with her skin. The injury to Kaylee's brain was so significant that surgeons feared it would prove fatal, and Kaylee required hospitalization for approximately five months. And, evidence established that Kaylee's injury could not have been caused by any ordinary parent-child interaction, ordinary accidental fall, or even a severe household fall, let alone by the scenario described by defendant. Therefore, we conclude that there was evidence in the record to support the trial court's determination that Kaylee was treated with excessive brutality. Consequently, the trial court did not abuse its discretion by scoring OV 7 at 50 points. *McLaughlin*, 258 Mich App 671; *Hornsby*, 251 Mich App at 468.

In light of our resolution of defendant's challenge to the scoring of OV 7, we need not review his challenge to the scoring of OVs 4 and 10. Resolution of those challenges in defendant's favor would not affect his sentencing guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996).

We affirm.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering